No. 19-6252

IN THE

Supreme Court of the United States

EDINSON H. RAMIREZ,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

REPLY BRIEF FOR THE PETITIONER

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Voir dire serves to weed out jurors who cannot render a fair and impartial verdict. Most jurisdictions hold that a petitioner satisfies *Strickland*'s first prong (deficient performance) by showing that trial counsel made a non-strategic error in *voir dire*; and the second prong (prejudice) by showing that the error resulted in an actually biased juror participating in deliberations. Regardless of the strength of the prosecution's evidence, a biased juror negates the "impartial tribunal" required for a "fair trial" under *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

The Maryland high court held that Mr. Ramirez's trial counsel made a non-strategic error in *voir dire*. Trial counsel challenged Juror 25 and gave her recollection of Juror 25's answer to a "crime victim" question. But Juror 25 had not answered *any* questions. Counsel was, in fact, summarizing Juror 27's testimony.

That error was prejudicial because Juror 27, who was part of the jury that convicted Mr. Ramirez, admitted to an anti-defendant bias. Juror 27 swore *in voir dire* that he could not be fair and impartial, because of his experience as a crime victim. Under most jurisdictions' decisions, such actual bias establishes prejudice.

Instead, the Maryland court read *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), as mandating a minority approach that looks to the strength of the prosecution's case. *Weaver* did no such thing. It held that *Strickland* prejudice is context-dependent, and that there was no prejudice from the closure of the courtroom without evidence of an effect on the judge or jury's neutrality. The decision here thus exacerbates a division of authority on the test for prejudice in the context of juror bias, and this case presents an ideal vehicle to resolve that division.

A. Courts are divided on the test for prejudice in this context.

A "fair trial is one in which evidence subject to adversarial testing is presented to an *impartial tribunal* for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (emphasis added). "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695. But what happens when counsel's deficient performance in *voir dire* deprives the accused of such an impartial tribunal?

Appellate courts, with the exception of Maryland and Illinois, have held that a habeas petitioner establishes *Strickland* prejudice by showing that deliberations included a juror with actual bias, not merely potential bias. *Holder v. Palmer*, 588 F.3d 328, 339 (6th Cir. 2009) ("Because petitioner's claim for ineffective assistance of counsel is based on his trial counsel's failure to strike the allegedly biased jurors, petitioner must show that the jurors were actually biased against him."); *Virgil v. Dretke*, 446 F.3d 598, 613 (5th Cir. 2006) (the "defense was prejudiced under *Strickland* by the sitting of [two jurors], as each unequivocally expressed that they could not sit as fair and impartial jurors, and the state court's decision to the contrary cannot stand"); *State v. King*, 190 P.3d 1283, 1289 (Utah 2008) (*Strickland* prejudice turns on a "distinction between actual and potential bias"); *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007) ("In the context of the denial of challenges for cause, such prejudice can be shown only where one who was actually biased against the defendant sat as a juror."); *State v. Carter*, 641 N.W.2d 517, 521 (Wis. Ct. App. 2002) (same).

The majority rule gives effect to both prongs of *Strickland*, because not every instance of deficient performance will result in a finding of prejudice. For example, even if *voir dire* reveals potential biases that should have led any reasonable defense attorney to challenge the juror, it is difficult to show actual bias if the juror professed an ability to decide the case fairly and impartially. *Carratelli*, 961 So. 2d at 326–327 (juror stated on follow-up questioning that he would "sit down with an open slate and listen to what is said and make up my mind from there"); *Mello v. DiPaulo*, 295 F.3d 137, 147 (1st Cir. 2002) ("Although the decision by defense counsel of an accused arsonist to permit the child of a firefighter to sit on the jury seems odd, [the petitioner] fails to demonstrate any prejudice from the inclusion on the jury of a juror who swore that she could be fair and impartial."). Or if the biased juror was an alternate who never participated in deliberations, the habeas petitioner may need to show that the alternate juror actually conferred with the other jurors. *Matylinsky v. Budge*, 577 F.3d 1083, 1096 (9th Cir. 2009). The focus is on whether the habeas petitioner has shown actual bias on the part of a juror who participated in deliberations.

Illinois and Maryland, however, follow a distinct minority approach to prejudice. They focus on the substantiality of the evidence against the accused, instead of the deprivation of the accused's right to have 12 impartial jurors decide whether that evidence proved guilt beyond reasonable doubt. In *People v. Metcalfe*, 782 N.E.2d 263 (Ill. 2002), the court held that trial counsel's failure to challenge a potentially biased juror was strategic and that, in any event, there was no prejudice,

because "the evidence was more than sufficient to prove defendant guilty beyond a reasonable doubt." *Id.* at 275. The defendant apparently did not petition this Court.

Nine years later, the Illinois Supreme Court reaffirmed its prejudice holding in *Metcalfe* and declined to adopt the "different approach to claims of ineffectiveness of counsel during jury selection" employed by "some federal court circuits and a handful of state courts." *People v. Manning*, 948 N.E.2d 542, 550 (Ill. 2011), *cert. denied*, 565 U.S. 1115 (2012). But *Manning* was a poor vehicle to resolve this division of authority, because the court found no deficient performance *Id.* at 552; *see id.* at 554 (Kilbridge, C.J., specially concurring) (criticizing court for grounding judgment on *Strickland*'s deficient-performance prong instead of prejudice prong); *id.* (Karmeier, J., specially concurring) (criticizing majority for reaching correctness of *Metcalfe*'s prejudice holding when case was resolved on *Strickland*'s first prong).

Now Illinois has company. The Maryland high court found Mr. Ramirez's counsel's performance deficient, but not prejudicial. Juror 27 stated "that, approximately a year-and-a-half earlier, his apartment had been 'broken into.'" 212 A.3d at 384. The trial court "asked whether 'that experience would, in any way, affect his ability to render fair and impartial verdict in this case." *Id.* (internal brackets omitted). "Juror 27 responded: 'I believe it would.'" *Id.* "Ramirez's trial counsel did not ask Juror 27 any follow-up questions, or request that the circuit court do so." *Id.* She "did not move to strike Juror 27 for cause based on his response to the 'crime victim' question, but moved to strike Juror 25 for cause on the ground that his 'home was broken into' and his 'response as to whether it would affect them was, I believe

it would.'" *Id.* "Juror 25, however, had not responded to any questions during *voir dire*." *Id.* The trial court "granted the motion to strike Juror 25 for cause," and Juror 27 served as a juror without objection. *Id.*

From there, the Maryland high court held there was no prejudice, in an analysis that mirrored the Illinois approach. Rather than examine whether Juror 27 was actually biased,[1] the court reasoned that "generally, a petitioner fails to prove that his or her trial counsel's performance prejudiced him or her where, at trial, the State offered strong evidence of the petitioner's guilt," and that the "strength of the State's case against Ramirez leads to the conclusion that there is no substantial or significant possibility that the outcome of the trial would have been different had Juror 27 not served on the jury." 212 A.3d at 390, 392.

Judge Robert McDonald dissented from the court's holding that a "defendant who has been found guilty by a jury that includes an admittedly biased juror must have evidence of prejudice beyond the biased individual's presence on the jury." 212 A.3d at 394. "An indispensable element of a fair trial is an impartial arbiter." *Id.* at 393. "It has long been held, and perhaps goes without saying, that a biased jury 'violates even the minimal standards of due process.'" *Id.* at 393–394 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). "One could fill pages with quotations from every court in the country expressing the principle that an impartial jury is one of the most

[1] The Court of Appeals' departure from the majority rule was so complete that it did not even address whether Juror 27 was actually biased. Consistent with majority rule decisions, the dissent recognized that Juror 27's unqualified admission of bias was sufficient to show actual bias. 212 A.3d at 394; *see Virgil*, 446 F.3d at 613. If the Court grants certiorari and adopts the majority rule, it could either determine actual bias or remand to the Court of Appeals.

basic and essential elements of our criminal justice system and that the presence of a biased individual on a jury deprives a defendant of that right." *Id.* at 394. "Courts have not hesitated to grant postconviction relief when it is established that the jury that returned the conviction included a biased member." *Id.* (citing, *e.g.*, *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001)).

The dissent offered compelling reasons for focusing on whether the juror's *voir dire* responses establish actual prejudice. The rules of evidence "preclude testimony from jurors concerning their deliberations." *Id.* at 394 & n.3 (citing Md. Rule 5-606 and Fed. R. Evid. 606); *see Warger v. Shauers*, 574 U.S. 40, 51 (2014). "A petitioner in Mr. Ramirez's shoes would face the same roadblock even if *all* of the jurors who had professed bias during the jury selection process had been seated on the jury." 212 A.3d at 394. And if prejudice turns on "the strength of the evidence at trial," the implication is that "if the evidence is strong enough, it does not matter whether one is tried by an impartial tribunal." *Id.* at 394–395. The majority responded that *Weaver* compelled a focus on the strength of the evidence, which was the only way to measure prejudice. 212 A.3d at 388 n.11. As discussed in the next section, this reading of *Weaver* cannot stand.

B. *Weaver v. Massachusetts* does not affect the division of authority.

On its face, *Weaver* did not do what the State says it did—broadly abrogate authority regarding prejudice from errors that, on direct appeal, would be classified as structural. The Court noted a division between courts holding that "when a defendant shows that his attorney unreasonably failed to object to a structural error, the defendant is entitled to a new trial without further inquiry," and others holding

that "the defendant is entitled to relief only if he or she can show prejudice."[2] 137 S. Ct. at 1907. This Court "resolve[d] that disagreement … specifically and only in the context of trial counsel's failure to object to the closure of the courtroom during jury selection." *Id.* The petitioner failed to show "that the potential harms flowing from a courtroom closure came to pass," such as that "any juror lied during *voir dire*" or "that any of the participants failed to approach their duties with the *neutrality* and serious purpose that our system demands." 137 S. Ct. at 1913 (emphasis added). The Court was careful to note that "the concept of prejudice is defined in different ways depending on the context in which it appears." *Id.* at 1911.

Weaver did not abrogate or undermine the majority rule that a showing of actual bias establishes *Strickland* prejudice in this particular context. For example, Judge Higginbotham's opinion for the Fifth Circuit in *Virgil* held that a "showing of constitutionally deficient performance is not sufficient to sustain an ineffective assistance of counsel claim," based on counsel's failure to strike two jurors, and that the petitioner still "must establish that counsel's deficient performance prejudiced his defense." 446 F.3d at 611. Prejudice was not presumed. *Id.* at 612.

Consistent with the context-dependent approach to prejudice, *Virgil* explained that "*Strickland*'s prejudice inquiry is process-based: Given counsel's deficient performance, do we have confidence in the process afforded the criminally accused?" 446 F.3d at 612. "We focus on ferreting out 'unreliable' results caused by 'a breakdown

[2] The State refers to Justice Kennedy's opinion for the Court in *Weaver* as a plurality opinion. To the contrary, "KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and THOMAS, GINSBURG, SOTOMAYOR, and GORSUCH, JJ., joined." *Weaver*, 137 S. Ct. at 1904–1905.

in the adversarial process that our system counts on to produce just results.'" *Id.* (quoting *Strickland*, 466 U.S. at 696). "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and *impartially* applying the standards that govern the decision." *Id.* (quoting *Strickland*, 466 U.S. at 695) (emphasis in *Virgil*). As a result of counsel's deficient performance, the jury included two jurors who "unequivocally expressed their inability to serve as fair and impartial jurors." *Id.* at 613. "Our criminal justice system is predicated on the notion that those accused of criminal offenses are innocent until proven guilty and are entitled to a jury of persons willing and able to consider fairly the evidence presented in order to reach a determination of guilt or innocence." *Id.* "Expressed in *Strickland* terms, the deficient performance of counsel denied Virgil an impartial jury, leaving him with one that could not constitutionally convict, perforce establishing *Strickland* prejudice with its focus upon reliability." *Id.* at 614.

Majority-rule jurisdictions have found, consistent with *Virgil*, that a habeas petitioner establishes *Strickland* prejudice by establishing actual bias on the juror's part. *Supra* § A. *Hughes*, which the Maryland Court of Appeals rejected out-of-hand as failing to require prejudice, in fact held that, on "a claim that a biased juror prejudiced him," the petitioner "must show that the juror was actually biased against him." 258 F.3d at 458 (quoting *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995)).

Authorities finding prejudice based on a juror's actual bias do not, as the Maryland court held, undermine *Strickland*'s two-step analysis. In some cases, such as this one, the same evidence should make it easy to establish both prongs. If a juror

professes an inability to render a fair and impartial verdict during *voir dire* and then participates in deliberations, then counsel's deficient performance and the resulting prejudice are manifest. But in some cases it is possible to establish deficient performance without also proving prejudice. Counsel may have failed to question a juror at all about potential bias that the juror's questionnaire might indicate. *Mello*, 295 F.3d at 147. The juror may have given unclear or conflicting answers in *voir dire*. *Hughes*, 258 F.3d at 458; *Carratelli*, 961 So. 2d at 326–327. Or the juror may have been discharged before deliberations began. *Matylinsky*, 577 F.3d at 1096.

Rather than *excuse* a showing of prejudice, the majority-rule decisions *define* prejudice in the context of counsel's failure to challenge a juror in *voir dire*. *Weaver* left it for future cases how to define prejudice in contexts other than courtroom-closure. This case presents a straightforward opportunity to clarify the test for prejudice in this particular context.

C. The State's "vehicle" concerns are misplaced

Mr. Ramirez's case presents an ideal vehicle for the Court to resolve the division of authority on the prejudice question. This case is unlike *Manning*, where the Illinois Supreme Court held that the petitioner proved neither *Strickland* prong, and where concurring judges characterized the prejudice holding as dicta. *Supra* § A. The Maryland Court of Appeals unanimously found deficient performance, and the judges divided on the test for prejudice in this context.

The State's vehicle concerns relate to deficient-performance issues already resolved against it. By its rationale, the only good vehicle would be one where the State conceded that the deficient-performance findings against it were correct. To the

contrary, the Maryland high court's findings against the State are what makes this an ideal vehicle on the prejudice question.

Trial counsel successfully challenged "Juror 25, for cause on the ground that his 'home was broken into' and his 'response as to whether it would affect them was, I believe it would.'" 464 Md. at 540. "Juror 25, however, had not responded to any questions during *voir dire*." *Id.* Rather, that is how Juror 27 responded to the question. *Id.* at 539–540. The State complains that the lower courts had not framed the issue this way, and that the Maryland Court of Appeals should have remanded instead of adding two and two together. This is an issue of Maryland procedure, on which the State lost, and rightfully so. *See* Md. Rule 8-131(a). It has no bearing on the prejudice question raised in the petition. This is a classic case in which certiorari is appropriate. The majority and the dissent agreed that the case boils down to whether or not to follow other jurisdictions' holdings on a dispositive point.[3]

D. Maryland is drifting from the mainstream on *Strickland* prejudice.

This case is an excellent vehicle for another reason—Maryland's position as an outlier on questions of *Strickland* prejudice. Here, the Court of Appeals relied on *State v. Syed*, 204 A.3d 139 (Md. 2019), *cert. denied*, __ U.S. __ (Nov. 15, 2019). Shortly before the *Syed* decision, the Connecticut Supreme Court noted its inability to find a "a single case … in which the failure to present the testimony of a credible,

[3] Judge McDonald, who authored the dissent in this case, previously authored a dissent from a Court of Appeals postconviction decision that this Court unanimously reversed; and an opinion for the Court of Appeals that this Court affirmed. *Kulbicki v. State*, 99 A.3d 730 (Md. 2014), *rev'd*, 136 S. Ct. 2 (2015); *Comptroller v. Wynne*, 64 A.3d 453 (Md. 2013), *aff'd*, 135 S. Ct. 1787 (2015).

noncumulative, independent alibi witness was determined not to have prejudiced a petitioner under *Strickland*'s second prong." *Skakel v. Comm'r of Correction*, 188 A.3d 1, 42 (Conn. 2018), *cert. denied,* 139 S. Ct. 788 (2019). Maryland became the first state to do so in 2019, holding that counsel's failure to investigate an alibi witness was deficient, but that the "substantial direct and circumstantial evidence pointing to Mr. Syed's guilt" precluded a finding of prejudice. *Syed*, 204 A.3d at 160.

Although this Court denied certiorari in *Syed*, it did so on the State's assurance that Maryland's approach to *Strickland* prejudice was no different from any other jurisdiction's. The State argued that the "'split' envisioned by Syed is illusory," and that "[d]ifferent facts, not a different method of legal analysis, fully explain why prejudice was found in those cases but not this one." Brief in Opposition, *Syed v. Maryland*, No. 19-227 (U.S. filed Oct. 18, 2019), at 2, 20.

This case underscores that the Maryland Court of Appeals takes an unusually anti-petitioner approach to *Strickland* prejudice. It gave short shrift to outside authority, based on a reading of *Weaver* at odds with the Court's context-dependent approach. *Supra* § B. Just last month, the Court of Appeals went further and held that a petitioner failed to establish *Strickland* prejudice from trial counsel's failure to request an alibi instruction, holding that prejudice depended on the weight of the evidence. *State v. Mann*, __ A.3d __, 2019 WL 6907266, at *14 (Md. Dec. 19, 2019) ("This case is on all fours with *Syed*[.]").

Contrary to *Weaver*, Maryland is taking a one-size-fits-all approach to *Strickland* prejudice, including in contexts where other courts agree that the weight

of the evidence is a poor lens for assessing prejudice. And, as discussed in the next section, even one outlier jurisdiction can create federal-state friction nationwide.

E. Federalism favors prompt review of this division of authority.

Courts have found prejudice from a biased juror's participation in deliberations, even on deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Virgil*, 446 F.3d at 607. Going forward, however, a respondent can cite a "division of authority" in arguing that a state court "did not unreasonably apply clearly established federal law" under AEDPA. *Lowe v. Swanson*, 663 F.3d 258, 263 (6th Cir. 2011). In the interest of harmonious federal-state relations, the Court should grant certiorari to resolve the division of authority now.

Certiorari review of state supreme court decisions presents none of the federalism concerns that habeas review can. The founding generation understood that "'the national and State systems are to be regarded as ONE WHOLE,'" meaning that state courts "'will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision.'" *Cohens v. Virginia*, 19 U.S. 264, 419–420 (1821) (quoting Alexander Hamilton, The Federalist No. 82 (July 2, 1788)). Even opponents of ratification agreed. *See* Brutus, Anti-Federalist XIV (Feb. 28, 1788) (advocating for writs of error to state supreme courts in lieu of inferior federal courts).

Inferior federal judges' review of state supreme court decisions is much more fraught. In *Brown v. Allen*, 344 U.S. 443, 463–465 (1953), the Court recognized a district court's power under 28 U.S.C. § 2254 to review a federal claim that the state

courts had rejected. The power of a single federal trial judge to review a state supreme court's judgment proved controversial—culminating in AEDPA, which allows habeas review of a state court's interpretation of the law only where "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

AEDPA placed a higher premium on this Court reviewing state supreme court decisions, but there are structural barriers to criminal defendants filing such petitions. A "State need not appoint counsel to aid a poor person in discretionary appeals to the State's highest court, or in petitioning for review in this Court." *Halbert v. Michigan*, 545 U.S. 605, 610 (2005). Due to poor funding, high caseloads, and unfamiliarity with this Court's procedures, attorneys for indigent state defendants often lack the wherewithal to seek or obtain review in this Court. Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari From Judgments of State Courts*, 50 Wm. & Mary L. Rev. 211, 257–261 (2008).

This case shows that those structural barriers are formidable. The Maryland decision turned on a question of federal law, and the dissent identified a division of authority on that question. Had such a division arisen on a federal appellate court, appointed counsel would have been obligated to petition on this substantial question. *See Austin v. United States*, 513 U.S. 5, 8 (1994). Elite nationwide appellate practices likely would have competed for the opportunity to file the petition. The spotlight is

not so bright 32 miles away in Annapolis. Thankfully, this Court asked the State to respond to Mr. Ramirez's pro se petition.

The Court should seize this opportunity to resolve the prejudice question. Federal prisoners have consistently won on this issue, and the United States appears to have little appetite to seek review in this Court. For state prisoners, many of the best vehicles never even make it to their respective state supreme courts, much less to this Court. If the Court declines review in this case, then the issue is most likely to arise on AEDPA review by federal courts of state court convictions.

AEDPA review would create unnecessary federal-state friction. Throughout the country, habeas respondents will cite this decision to argue that a reasonable disagreement exists on the prejudice question, particularly post-*Weaver*. At every level, even before this Court, the question in an AEDPA case would not be which line of authority is correct, but whether the legal standard articulated here was objectively reasonable. It is preferable for this Court to resolve the division of authority now. Otherwise, inferior federal courts, faced with a conflict between their own precedents and outlier state decisions, will be passing judgment on whether the minority-rule state supreme court decisions were objectively reasonable.

Conclusion

The Court should grant the petition for a writ of certiorari.

Respectfully submitted:

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Dated: January 27, 2020

[*] There has been no change in circumstances that would affect Mr. Ramirez's motion for leave to proceed in forma pauperis. Counsel is filing this reply brief pro bono.